

KIRKLAND ALERT

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FTC Endorsement Guides: A Refresher for the New Year

The year 2009 was marked by notable changes to the FTC's Endorsement Guides, and those changes are now in effect.

Revised Guides Concerning the Use of Endorsement and Testimonials in Advertising are Now in Effect

An endorsement is a statement (or "testimonial") made in an advertisement by an individual (including consumers, experts or celebrities), group or institution indicating that the endorser uses and approves of a product or service. For example, a consumer touting the efficacy of a detergent would be an endorsement by that consumer; a television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee would be an endorsement. Since 1980, the FTC has published non-binding Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides") to assist advertisers in abiding by the requirements of Section 5 of the FTC Act, which bans unfair or deceptive methods or practices affecting commerce. The Endorsement Guides address both general principles concerning endorsements and particular guidance according to the source of the endorsement. The FTC's guides also are illustrated through numerous examples reflecting real-world scenarios.

After almost two years of regulatory review, the FTC published final, modified Endorsement Guides, which went into effect on December 1, 2009. Some of the changes simply align the Endorsement Guides with principles that have already been cemented through FTC enforcement actions. For example, now *both* the advertiser *and* the endorser are potentially liable for false or unsubstantiated statements or for failing to disclose material connections. On the whole, however, the modified Endorsement Guides are designed to address two main concerns: adequately preventing deception in advertising; and regulating new and non-traditional forms of advertising.

Elimination of the "Disclaimer of Typicality" Safe Harbor

Arguably the most significant change in the Endorsement Guides is the elimination of the "disclaimer of typicality" safe harbor for consumer testimonials. Under the 1980 Endorsement Guides, if an advertiser used a testimonial describing an atypical result, the advertiser could disclose either the generally expected results or the limited applicability of the endorser's experience. The second option proved to be the most popular, as it allowed advertisers to avoid potential liability simply by including a "Results not typical" disclaimer in the advertisement.

Now, the Endorsement Guides require that advertisers clearly and conspicuously disclose the generally expected results in the advertised circumstances, as well as have adequate substantiation for the representation being made about the endorser's experience. The FTC eliminated the safe harbor (*i.e.*, "results not typical") out of a concern that such disclaimers do not adequately inform consumers about the advertised product or service.

Increased Burden to Disclose Material Connections

The Endorsement Guides also eliminate a presumption that consumers ordinarily expect there to be material connections between advertisers and expert or celebrity endorsers, thus leaving the question open for a case-by-case determination. The 1980 Endorsement Guides required advertisers to disclose material connections be-

tween themselves and endorsers (*i.e.*, some type of payment/relationship) if consumers would not reasonably expect such a material connection to exist. The FTC specifically exempted expert and celebrity endorsements from this requirement, however, by stating that consumers ordinarily expected such endorsers to be compensated. With the new revisions to the Endorsement Guides, the FTC is noting that in some circumstances consumers may *not* be aware of the connections and compensation received by a celebrity or expert endorser.

For example, although standard cash payments or royalties to expert and celebrity endorsers still would not need to be disclosed (because consumers ordinarily expect such compensation), the revised Endorsement Guides now clarify that anything beyond reasonable compensation to an expert or celebrity endorser would need to be disclosed—such as receiving a percentage of gross product sales or owning part of the company. Further, as discussed in more detail below, endorsers may have to disclose material connections with celebrity endorsers in new or non-traditional advertising.

Implications for New and Non-Traditional Advertising and Marketing

Under the revised Endorsement Guides, new and non-traditional forms of advertising—such as blogs, online message boards and street teams—also may qualify as “endorsements” subject to FTC enforcement. For example, bloggers who receive compensation in cash or in-kind to review a product may be considered “endorsers” under the revised Endorsement

Guides. As such, both the blogger and advertiser would be liable for any false or unsubstantiated claims the blogger makes about the product. Furthermore, both the blogger and advertiser would be liable for failing to disclose the material connection between them.

As mentioned above, even more traditional celebrity and/or expert endorser forms of compensation now might require disclosure in the world of new and non-traditional advertising. For example, the fact that a celebrity is paid for speaking publicly about an endorsed product or service would likely affect the credibility of comments about the product or service when made on a television talk show or on a social networking site. Now, under the Endorsement Guides, the endorser and advertiser would need to disclose this material connection.

Conclusion and Recommendations

The revised Endorsement Guides likely will have a significant impact on how advertisers market their products and structure relationships with endorsers. The above discussion highlights only the major substantive changes to the Endorsement Guides, but there are many other changes that should also be examined. Advertisers should evaluate how the revised Endorsement Guides relate to their marketing, promotion and advertising practices. Businesses should also evaluate their relationships with endorsers and the practices of those endorsers who would be subject to FTC regulation to ensure that they are in compliance with the revised Endorsement Guides.

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